SINGAPORE REPORTS

Wong Kai Chuen Philip v Public Prosecutor

HIGH COURT (SINGAPORE) — MAGISTRATE'S APPEAL NO 187 OF 1989
CHAN SEK KEONG J
29 OCTOBER 1990

Criminal Procedure — Sentencing — Consecutive sentence — Principles to be applied — Criminal breach of trust — Serious offence — Offence committed by solicitor — Aggravating factors to be considered — Penal Code (Cap 224, 1985 Ed), ss 402 & 409

The appellant was an advocate and solicitor who had pleaded guilty to two charges of criminal breach of trust. A further four charges were taken into consideration. The total amount that the appellant misappropriated was $1,841,232.20. He made no restitution. The appellant was sentenced to three years' imprisonment in respect of each charge, the sentences were ordered to run consecutively. The appellant appealed against the sentence.

Held, dismissing the appeal:

(1) Although the appellant had surrendered himself, he did so at a time when he really had no other choice. The plea of guilty was not made in a case where the prosecution might have any trouble in proving the charges. There is not much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up.

(2) In an offence of criminal breach of trust, it is a matter of common sense that, all other things being equal, the larger the amount dishonestly misappropriated the greater the culpability of the offender and the more severe the sentence of the court.

(3) Where consecutive sentences are passed, the sentencer must take into account the totality of the cumulative sentences to determine whether it is justified by the criminal behaviour of the offender in the case as a whole. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record or prospects.

(4) The offence of criminal breach is by itself a serious offence, but when committed by a solicitor it can be said to be aggravated. Lawyers trade on their honesty. They sell their trustworthiness. Accordingly, one of the gravest offenses an advocate and solicitor can commit is to take his clients' money. Criminal breach of trust by a lawyer in the discharge of his professional duty must inevitably call for a custodial sentence of a deterrent nature, not so much as to deter the offender concerned but to deter other members of his profession from committing similar offences.

(5) The appellant had made no restitution, the amounts misappropriated were considerable and the only person who had benefitted from this criminal act was the accused.

Case referred to

1 *R* v *Barrick* (1985) 81 Cr App R 78 (folld).

Legislation referred to

Penal Code (Cap 224, 1985 Ed) ss 402, 409

Anwarul Haque for the appellant.
Roy Neighbour (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Chan Sek Keong J: The appellant was as an advocate and solicitor of the Supreme Court of Singapore. He commenced practice as a sole proprietor under the name of Philip Wong & Co on 1 May 1969. His practice was mainly in the area of conveyancing. On 20 March 1989, he was struck off the rolls of advocates and solicitors by the Supreme Court on a disciplinary charge which was unrelated to the offences in respect of which the present appeal against sentence has been brought.

On 21 March 1989, the Council of the Law Society of Singapore passed a resolution vesting in the Law Society all moneys held in the clients' account in the name of the appellant's firm and took control of it on 22 March 1989. The bank statement as at 31 March 1989 showed that the firm had a credit balance of $5,903.60 in the clients' account.

On 11 April 1989, the appellant surrendered himself to the Commercial Affairs Department and he was formally arrested on the following day. On 14 April 1989, he was adjudged a bankrupt by the High Court.

On 24 April 1989, the appellant was charged with six charges of criminal breach of trust in his capacity as an agent of clients' moneys held in the clients' account of the firm. In the event, the prosecution proceeded with only two charges, to which the appellant pleaded guilty, on the agreement that the remaining four charges were to be taken into consideration for the purpose of sentence. The material facts of the six charges may be tabulated thus:

Case no	Amount involved	No of clients	Period
DAC 4241	$143,220.15	7	10.1.89 - 9.3.89
DAC 4242	$683,039.40	9	25.1.88 - 31.12.88
DAC 4243	$650,419.50	1	13.5.88 - 28.12.88
DAC 4244	$163,961.29	6	20.4.87 - 29.12.87
DAC 4245	$128,879.21	3	14.3.86 - 15.11.86
DAC 4246	$ 71,712.81	4	1.1.85 - 15.6.85
Total	$1,841,232.20	30	

The statement to facts which the appellant accepted for the purpose of pleading guilty to the two charges under DAC 4241 and DAC 4242 also disclosed that the bulk of the money misappropriated from the clients' account consisted of moneys paid by clients for completion of property transactions, payment of stamp fees and also one large sum held as stakeholder. There is no disclo-

sure on what the appellant had done with the moneys dishonestly misappropriated by him over the years.

The appellant was represented by counsel in the plea of guilty. Counsel put forward the following factors in mitigation:

(1) he surrendered himself and co-operated with the police, resulting in the expedited completion of investigation;
(2) he pleased guilty and therefore demonstrated his remorse;
(3) he was a bankrupt and struck off the roll of advocates and solicitors;
(4) he was a man of good character and contributed to community service in the following respects:
   (a) as a member of the Dunearn Secondary School Advisory Board from 1969-1989;
   (b) as a tutor in the Postgraduate Law Course from 1980-1988;
   (c) as the President of the Singapore Ten Pin Bowling Congress from 1985-1989/March, during which he helped to raise $430,000;
   (d) as a blood donor for 18 times from 1980-1989.

The senior district judge sentenced the appellant to serve, consecutively, a term of three years' imprisonment on each of the two charges. In his grounds of decision, the judge reminded himself that the maximum sentence he could impose for the two offences was seven years' imprisonment for each offence, so that the three years he actually imposed was a little short of one-half of the maximum sentence within his own jurisdiction. He accepted all the mitigation factors I have mentioned above save that the appellant's record of community service was not expressly adverted to in his grounds of decision.

The judge was of the view that in spite of what he regarded as strong mitigation factors, he could not overlook the following facts: (i) the appellant misappropriated moneys he was holding as an advocate and solicitor, a position of trust in society; (ii) the regularity of the misappropriations over the period from 1985 to 1989; (iii) the total amount involved (which was more than $1.8m); (iv) the absence of any restitution.

The appellant was dissatisfied with the sentence and has now appealed against it. Before me, his counsel has advanced a number of grounds of appeal which I shall consider under the following heads:

1 *Strength of mitigation factors*

The submission under this head was that the judge had failed to give due weight to the mitigation factors generally and in particular to the appellant's previous good character. In his grounds of decision, the judge stated that the appellant 'has convincingly demonstrated his remorse for his criminal acts' (by his co-operation) and in respect of which the judge considered as of 'paramount importance'. He also said it was to the appellant's 'credit' that he co-operated with the CAD and that 'Just as admirable a factor to be considered in his favour is the fact that he had voluntarily surrendered himself to the CAD'. This is rather fulsome language to describe the mitigation quality of the surrender and the plea of guilty. These statements plainly show that there is no substance in counsel's submission on this point.

However, having given careful consideration to the entire background in which the offences were committed and, in particular to the conduct of the appellant during the period when he was misappropriating his clients' moneys, I am of the view that the judge has given undue weight to these two factors.

On the statement of facts, the appellant misappropriated during 1988 a total sum of about $1.33m and in the three months of 1989 he misappropriated about $143,000. These sums were misappropriated during a period when (i) a judgment for $235,000 had been obtained against him in respect of which (ii) a petition had to be filed by the judgment creditor to make him a bankrupt and (iii) which he was so made on 14 April 1989 and (iv) when he had been ordered to show cause in disciplinary proceedings against him. The appellant did not appear to have been remorseful during this period. In fact, he contested the claim against him for the refund of $235,000 (which represented the 10% deposit for the purchase of a property from the appellant's client) on the ground that his client had forfeited the said deposit when the truth was that he had dishonestly misappropriated this sum between 29 March 1988 to 31 August 1988 as admitted in the statement of facts.

Although the appellant surrendered himself to the CAD, it is significant to note that this event occurred at a time when he really had no other choice. He had no choice because the Council of the Law Society had taken over the clients' account of his firm and it was only a question of time before his misdeeds came to light. This is in stark contrast to the defence he put forward in respect of the claim for $235,000 at a time when his misdeeds remained secret and safe with him. Similarly, the plea of guilty was not made in a case where the prosecution might have any trouble in proving the charges.

In making these comments, I do not dissent from the principle applied by the senior district judge that the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend on the cir-

cumstances of each case. I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in in the face of absolute knowledge that the game is up.

With regard to the submission that the previous good character of the appellant, with particular reference to his community service, had not been taken into account, it is, of course, not possible to say whether the senior district judge would have imposed the same sentences and in the same way if he had expressly taken them into account. I used the word 'expressly' advisedly as it was unlikely that he could have overlooked them as he passed sentence on the day following the plea of guilty and counsel's submission was made in writing. Be that as it may, for reasons which I shall give later, I do not think that the community service rendered by the appellant would have made a material difference to the sentences in this case, having regard to all the circumstances.

Counsel has also drawn the attention of the court to the fact that the appellant is now 50 years old and is 'out of circulation' and is a bankrupt. He submitted that imprisonment would deprive the appellant of the means of discharging his debts and that a long term of imprisonment would not protect the public interest. I do not agree with this submission. The appellant's bankruptcy would make it difficult for him to repay his creditors, and his loss of his professional status would deprive him of the opportunity to do so. As for the point on public interest, I shall consider this later in relation to the principle of deterrence.

I should finally mention that the circumstances of this case are such that the appellant is, unfortunately, not even in a position to rely on as a mitigation factor what, in a normal case, would be the consequence of a conviction for an offence involving dishonesty, viz the loss of professional status. Here, the loss of that status did not flow from his conviction but from an unrelated disciplinary offence.

2 *Proportionality*

I agree with counsel for the appellant on his submission on the principle of proportionality in sentencing. In an offence like criminal breach of trust, it is a matter of common sense that, all other things being equal, the larger the amount dishonestly misappropriated the greater the culpability of the offender and the more severe the sentence of the court. However, the senior district judge is not lacking in knowledge or experience in the sentencing of offenders and accordingly, I do not believe that he has overlooked this obvious point when he decided to impose a term of three years' imprisonment for each offence involving substantially different sums of money.

In any case, I do not think that this point matters in this case. The division of the charges into six periods of time were a matter of convenience. The prosecution could have framed any number of charges from one to 30 or more. This is a matter of form rather than of substance. The important question is whether the totality of the consecutive sentences was manifestly excessive, and to this issue I now turn.

3 *Totality of consecutive sentences*

It is an established principle of sentencing that where consecutive sentences are passed against an offender, the sentencer must take into account the totality of the cumulative sentences to determine whether it is justified by the criminal behaviour of the offender in the case as a whole. As analysed by DA Thomas in *Principles of Sentencing* (2nd Ed) at p 57, the totality principle has two limbs:

> A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record or prospects.

The issue in this appeal is therefore whether the cumulative six years' imprisonment infringes either of these two considerations.

Before I answer that question, there is another argument of counsel for the appellant that I should first dispose of. It is that the senior district judge, in exercising his discretion to order the sentences to run consecutively, did not act judicially on the ground that he gave no reason for so acting. It is true that the judge did not explicitly say why he considered the consecutive sentences to be appropriate in this case, but he did say that the offences merited a 'sterner punishment' which would have been 'sterner' but for the mitigating factors. One of the considerations that he expressly took into account was the fact that the total amount misappropriated by the appellant was a 'colossal $1.4m, or thereabouts, siphoned from his firm's clients' account over a period from 1985 to 1989'. In my view, it is sufficiently clear that from these references that what was uppermost in the mind of the senior district judge was the totality of the criminal acts of the appellant when he made the sentences consecutive. The judge was not looking merely at the two charges of criminal breach of trust but at all the criminal acts and the total amount involved.

4 *Was six years' imprisonment manifestly excessive?*

The important consideration under this head is the nature of the offence, as on it depends its gravity. It is criminal breach of trust. The gravity of this type of offence is recognized by the legislature in s 409 of the Penal Code. When committed by an agent, the maxi-

mum sentence is imprisonment for life, or up to ten years, and also liability to a fine. The rationale for viewing criminal breach of trust as a serious offence is explained in Andrew Ashworth's book, *Sentencing and Penal Policy* (1983) at p 194 in these words:

> Where an offence involves a breach of trust, this is generally treated as an aggravating factor. Its powerful influence is shown by the degree to which it outweighs factors which would normally go in mitigation. Indeed, there is the paradox that some of the strongest factors in mitigation (unblemished career, model citizen, good employment record) are often present in these cases and yet do not tell greatly in the offender's favour. The reason is that positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very basis of trust, and one of the burdens of a position of trust is an undertaking of incorruptibility. The individual who puts himself forward as trustworthy, is trusted by others and then takes advantage of his power for his own personal ends can be said to offend in two ways — not only does he commit the crime charged (be it theft, false accounting or a sexual offence), but in addition he breaches the trust placed in him by society and by the victims of the particular offence.

Although the appellant was tried on the two charges in the district court which, in consequence, limited the maximum sentence the district judge could impose to seven years each, it does not follow that the maximum sentence for that offence is seven years in terms of its gravity. The decision of the public prosecutor to bring criminal proceedings in the district court cannot affect the gravity of the offence as reflected in s 402 of the Penal Code. It may, at most, reflect his judgment on the appellant's culpability in relation to the offences. It is no more than a factor that the court may take into account.

There may be other aggravating factors. The deliberate and systematic embezzlement of clients' money by an advocate and solicitor is such a factor. In *R* v *Barrick*[1] at pp 81-82, Lord Lane CJ, after stating that the sum involved was not the only factor to be considered, said:

> The following are some of the matters to which the court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.

Applying the above guidelines to the present cases, what we have here is a case where (1) the amount dishonestly misappropriated was a large sum, (2) by a person who because of his status the public has entrusted to him the safety of their moneys in relation to their property transactions, (3) over a long period of time, (4) whose effect on some of the 30 victims could be traumatic or financially disastrous, bearing in mind that the purchase of a house is generally the most expensive transaction an ordinary person is likely to enter into in his lifetime, (5) which embezzlements have a serious impact on public confidence in the integrity of the legal profession, (6) the only person who has benefitted from the criminal acts was the appellant himself, and finally (7) he has not made any restitution at all to any of the victims.

Thus, whilst there are many aggravating factors in this case, there are only a few plausible and also relatively weak mitigating factors. I have commented on two of these earlier. The third factor, viz community service, is the only mitigating factor that can be said to be in his favour but that is a weak factor in an offence of this type for the reasons I have given. I do not think that it has such a material effect on the totality of the sentence that the sentence is manifestly excessive.

Counsel has also submitted that the senior district judge was wrong in giving undue weight to the status of the appellant as a solicitor. He said this was wrong. In support of this argument, he referred to a case (MA No 15/81) reported in *The Straits Times* concerning a solicitor who had drawn out a sum of about $11,000 from his firm's clients' account to settle a personal debt. He surrendered himself and was charged with criminal breach of trust to which he pleaded guilty. It was an isolated act. In fact, the cheque was drawn out from the general credit in anticipation, by a few days, of a sum of money due to be collected for a client who had given him consent to draw the same out. Thus, if he had waited a few days, he would not have committed the offence. He was sentenced to six months' imprisonment. The Chief Justice, in reducing the sentence to one day's imprisonment and a fine of $5,000, was reported to have said: 'In a CBT case, it could be wrong for a sentencing court to be more severe on the offender merely because he is a professional'.

Counsel relies on this statement. In my view, this statement does not assist the appellant in this appeal. The Chief Justice said it *could* be wrong and not that it *was* wrong. In the case before him, the Chief Justice found that it was wrong to give undue weight to the status of the wrongdoer because the circumstances in which the offence was committed were exceptionally unusual and provided exceptionally strong mitigating factors. The Chief Justice did not intend to mean and could not have meant that in every case of criminal breach of trust, a solicitor who commits such an offence should receive the same sentence as a lowly clerk who

commits that kind of offence. The circumstances of this case are very much different.

Lawyers trade on their honesty. They sell their trustworthiness. Accordingly, one of the gravest offences an advocate and solicitor can commit is to take his clients' money. Criminal breach of trust by a lawyer in the discharge of his professional duty must inevitably call for a custodial sentence of a deterrent nature, not so much as to deter the offender concerned but to deter other members of his profession from committing similar offences.

I will now refer to two other cases of criminal breach of trust committed by lawyers. In MA No 21 of 1975, the Chief Justice dismissed an appeal against a six-year sentence on a solicitor who had pleaded guilty to seven charges of criminal breach of trust of clients' money from 1972 to 1973. The total amount involved was slightly in excess of $200,000. The senior district judge had imposed a term of imprisonment of three years for each offence, the first two sentences to run consecutively, and the other five sentences to run concurrently with the first two sentences.

In 1979, another solicitor also pleaded guilty to four charges of criminal breach of trust (see DAC Nos 415/79, 417/79, 592/79 and 595/79). The total amount involved was about $1,480,000, of which restitution in the amount of about $543,590 had been made and a further sum of about $100,000 was available from the sale of his house. He was sentenced to imprisonment for a term of four years on each of the first two charges and three years' imprisonment on the remaining two charges. The judge made one of the three-year sentences consecutive with one of the four-year sentences, and the rest to run concurrently, with the result that the total custodial sentence imposed was seven years. The solicitor concerned did not appeal and this was consistent with the solicitor's statement in his plea of mitigation that he was prepared for any punishment that the court might pass upon him. His conduct demonstrated his genuine remorse for his wrongdoings.

For the reasons I have given, the consecutive sentences amounting to six years' imprisonment passed on the appellant are not excessive in the present case. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Haridass Ho & Partners.*

Reported by *Mathavan Devadas*

People's Parkway Development Pte Ltd v Ramanathan Yogendran

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 579 OF 1990
THEAN J
22 OCTOBER 1990

Legal Profession — Solicitor's undertaking — Construction of undertaking — Whether there is final adjudication of the dispute to which the undertaking relates — Meaning of final adjudication — Legal Profession Act (Cap 161, 1985 Ed), s 79

Words and Phrases — 'Final adjudication of the dispute'

The plaintiffs sought to enforce an undertaking given by the defendant, a solicitor, in relation to a dispute between the plaintiffs and the defendant's clients over a tenancy agreement. The defendant had given an undertaking to the plaintiffs to pay a maximum sum of $100,000 on account of rent and service charges for the period 1 June 1986 to 14 October 1986 which may be ordered against the defendant's clients on final adjudication of the rental dispute.

The clients had difficulties paying rent and service charges under the tenancy agreement and surrendered the premises to the plaintiffs in April 1987. On 7 May 1987, the plaintiffs, with the defendant's consent, instituted an action against the clients claiming, inter alia, rent and service charges for the period 1 June 1986 to 14 October 1986. The clients filed a defence but was subsequently wound up upon a petition presented by one of its creditors.

The plaintiffs' solicitors corresponded with the Official Receiver and liquidator of the clients who replied that he had no objection to the plaintiffs proceeding with the action against the clients and that he would consent to judgment with no costs against the clients. The plaintiffs subsequently obtained a consent judgment against the defendant's clients. The defendant was not informed nor served with the application.

The plaintiffs sued the defendant to enforce the undertaking. The issue was whether the dispute in respect of which the undertaking was given has been finally adjudicated.

Held, dismissing the plaintiffs' application:

(1) The defendant, by reason of the undertaking given, is plainly interested in the dispute between the plaintiffs and the clients. He is in a position analogous to a guarantor or an insurer of the clients and ought to be informed and served with the application for consent judgment.

(2) The defendant was not served with any notice of the application. He was not even informed at all of the application or the Official Receiver and liquidator's consent to judgment. It is not suggested and there is no evidence that the defendant has in any way given his consent. So far as the defendant is concerned, the dispute on which the clients' liability depends and in respect of which the defendant gave his undertaking has not been finally adjudicated.

(3) The parties at the time [the undertaking was given and accepted] contemplated 'an adjudication' of the dispute. The defendant's obligation on the undertaking was to be triggered off by an order made for payment to the plaintiffs of the rent and service charges (for the period in question) of the premises 'on a final adjudication of the dispute'.

(4) The expression 'final adjudication of the dispute' does not mean a mere pronouncement or recording of a judgment.